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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979
No. 79-1849

RINGLING BROS.-BARNUM & BAILEY COMBINED SHOWS, INC., and RUTH E. LUTZIC, Suing on Behalf of Herself and All Other Taxpayers Similarly Situated,

Petitioners,

v.

NEW YORK STATE TAX COMMISSION AND THE CITY OF NEW YORK,

Respondents.

# BRIEF OF RESPONDENT CITY OF NEW YORK IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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June 20, 1980

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NEW YORK STATE TAX COMMISSION AND THE CITY OF NEW YORK,

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# BRIEF OF RESPONDENT CITY OF NEW YORK IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## Preliminary Statement

The petitioners seek a writ of certiorari to review a judgment of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, (reprinted in the appendix to the petition, hereinafter cited as "A.", at page 27a) which unanimously

affirmed, without opinion, an order and judgment of the Supreme Court of the State of New York, County of New York (A., pp. 19a-26a).

Mr. Justice Postel of the latter court wrote an opinion which is not officially reported but appears in the appendix to the petition at pages 4a-16a. The opinion considers and rejects each of petitioners' contentions, except its claim of discrimination against interstate commerce, which had not yet been raised.

The claim of discrimination against interstate commerce, and a request for leave to replead to include such a claim, was first made in a reply affidavit, sworn to February 27, 1978, (six years after service of the complaint on February 4, 1972) in the course of a motion to renew and reargue the decision

of Mr. Justice Postel. Mr. Justice Kirschenbaum of the Supreme Court of the State of New York, County of New York, heard this motion and granted leave to renew, but, on renewal adhered to the decision of Justice Postel and denied petitioners' request for leave to replead. This opinion is not reported but is in the appendix to the petition at pages 17a-18a.

The decision, without opinion, of the Appellate Division, First Judicial Department, is reported at 72 AD 2d 978.

The New York Court of Appeals dismissed petitioners' appeal, taken as of right, upon the ground that no substantial constitutional question is directly involved, and denied petitioners' motion for leave to appeal. The order of the Court of Appeals appears in the appendix to the petition at page 30, and

the decision of that Court, without opinion, is reported at 49 NY 2d 703.

## Statutes and Regulations

(1)

Pertinent provisions of the tax statutes are set forth at pages 3-5 of the petition.

Pursuant to these statutes, the State Tax Commission, which administers both the State and City taxes involved herein, has issued regulations with respect to circuses and other arena events [Codes, Rules and Regulations of the State of New York, tit. 20, vol. B, Part 527 (dealing with taxable transactions), §527.10, subds. (b)(1)(ii) and (d)(2), in effect as of September 1, 1976].

Section 527.10(b)(1)(ii) of the Regulations provides the following [2 CCH New York Tax Reporter ¶69-410 ]:

"(ii) Taxable charges for entertainment or amusement include admissions to sporting events such as baseball or football games, stock car racing, and college athletic events, carnivals, rodeos, circuses and exhibitions.

Example 3: An arena sponsors a show in which trainers conduct various routines with animals, such as trained bears or horses. The admission charge is taxable.

Example 4: An admission charge to a trade show such as a boat, auto or horse show which is open to the public is an admission charge for entertainment or amusement."

Subdivision (d), par. (2) of Section 527.10 of the Regulations provides in pertinent part the following:

"(2) Charges for admission to dramatic or musical arts performances are excluded from tax. Dramatic and musical arts performances do not include variety shows, magic shows, circuses, animal acts, ice shows, aquatic shows and similar performances."

* * *

"Example 5: A show is composed of several acts in which performers dressed as story book characters, appear with musical accompaniment, portray scenes from books, and invite audience participation. This does not qualify as a dramatic or musical arts presentation."

(2)

The Civil Practice Law and Rules of the State of New York provide the following, in pertinent part, with respect to a motion to plead over (R3211, subd. e):

* * *

"Where a motion is made on the ground set forth in paragraph seven of subdivision (a)*, or on the ground that a defense is not stated, if the opposing party desires leave to plead again in the event the motion is granted, he shall so state in his opposing papers and may set forth evidence that could properly be considered on a

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*This ground is that the pleading fails to state a cause of action.

motion for summary judgment in support of a new pleading; leave to plead again shall not be granted unless the court is satisfied that the opposing party has good ground to support his cause of action or defense; the court may require the party seeking leave to plead again to submit evidence to justify the granting of such leave."

Questions Presented

1. Does a tax, imposed as a revenue raising measure upon admission charges to places of amusement, deny equal protection or due process to circuses in contravention of the Fourteenth Amendment to the United States Constitution, where the tax statute exempts from the tax, charges for admission to dramatic or musical arts performances, as defined therein, but not charges for admission to carnivals, rodeos or circuses.

2. Did the Court below properly determine, on the record before it, that the tax laws in question, as applied by the respondents, did not violate or infringe petitioners' constitutional rights under the Equal Protection or Due Process Clauses of the Fourteenth Amendment, or any First Amendment right protected by the Fourteenth Amendment?

3. Did the Court below properly refuse to allow petitioners, six years after serving their complaint, to amend the complaint to include allegations of discrimination against interstate commerce, in light of the requirements of Section 3211(e) of the New York Civil Practice Law and Rules governing such amendments.

## ARGUMENT

THERE IS NO SUBSTANTIAL FEDERAL QUESTION PRESENTED AS TO WHETHER THE TAX LAWS INVOLVED, OR THEIR ENFORCEMENT, DENY PETITIONERS EQUAL PROTECTION, DUE PROCESS, FREEDOM OF SPEACH, OR ANY OTHER RIGHT UNDER THE UNITED STATES CONSTITUTION.

(1)

Petitioners' equal protection argument with respect to the tax statutes, themselves, is that there is no rational basis for excluding circuses from the exemption provided for dramatic or musical arts performances.

However, the record below shows that the reason for this exemption was the financial plight of the legitimate theatre and the fear that a further decline in the number of legitimate theatres would seriously affect hotels, restaurants, taxis, garages and other businesses.

Moreover, Mr. Justice Postel, who originally heard this case, viewed a performance of petitioner Ringling Bros.'

circus at the request of the petitioners. As a result of his viewing, he concluded that the circus, as a matter of fact, was not a dramatic, choreographic or musical performance (A., p. 10a) and, therefore, did not come within the exemption.

Furthermore, the rule is elementary that a tax need not follow a pattern of rigid uniformity. Bell's Gap R'd Co. v. Pennsylvania, 134 U.S. 232, 237 (1890); Lawrence v. State Tax Comm., 286 U.S. 276, 284 (1932). It has been said that "in taxation there is a broader power of classification than in some other exercises of legislation." Citizens' Telephone Co. v. Fuller, 229 U.S. 322, 329 (1913). A tax classification is not arbitrary if any state of facts reasonably can be conceived that would sustain it. Allied Stores of Ohio v. Bowers, 358 U.S. 522, 528 (1959); Rapid Transit Corp. v. New York, 303 U.S.

573, 578 (1938); Carmichael v. Southern Coal Co., 301 U.S. 495, 509 (1937); Rast v. Van Deman & Louis, 240 U.S. 342, 357 (1916). Hence, if any reasonable purpose for the different tax treatment could have been in the minds of the legislators at the time that the statute was enacted, the tax law will be upheld. It is not necessary that the purpose be known with any certainty, nor need it be declared by the Legislature. Southwestern Oil Co. v. Texas 217 U.S. 114, 126 (1910).

(2)

Petitioners' claim of discriminatory enforcement of the tax is equally baseless.

Petitioners' statements (Pet., p. 10) that respondents imposed no tax on the Big Apple Circus and certain other shows is not supported by the record. The reference that petitioners make to the record (A. 45a) is tc an affidavit of a person who

purchased a ticket without being charged a tax.

Any circus or other show subject to the taxes on admissions, which fails to collect the taxes, does so at its peril. Obviously, the State Tax Commission cannot station a State employee at every place of business in the State to insure that the owner of the business complies with the Tax Law.* To impute non-enforcement of the tax from the taxpayer's failure to collect is to ignore the statutory procedure for enforcement which gives the Tax Commission at least three years in which to assess the tax [Tax L., §§1138, 1147(b); Admin. Code, §§A46-20.0, A46-29.0(b)], and is wholly illogical.

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*The taxes in question are part of general sales tax laws applicable to retail stores, restaurants, hotels and various service businesses, as well as to places of amusement.

(3)

Moreover, since September 1, 1976 there have been in effect regulations of the respondent State Tax Commission which expressly treat ice shows, aquatic shows, shows of story book characters in which the audience participates, and similar shows, the same as circuses, i.e., all are taxable under the regulations (See Reg. §527.10, supra,at pp.4-6).

(4)

Petitioners' contention that they have been deprived of due process of law has nothing to support it.

As the taxes with which we are concerned were enacted solely and simply as an exercise of the taxing power to raise revenue, the due process clause may not be availed of to condemn the statute.

Shapiro v. City of New York, 32 NY 2d 96, 102 (1973), app. dism. for want of a substantial fed. qn. 414 U.S. 804 (1973), pet. for rehr. den. 414 U.S. 1087 (1973); Ampco Print-Advs. Corp. v. City of N.Y., 14 NY 2d 11, 24 (1964), ap. dism. for want of a substantial fed. qn., 379 U.S. 6 (1964).

Nor did the refusal of the Court below to order additional discovery deprive petitioners of due process.

The respondent Tax Commission had produced exemption rulings requested by petitioners, but not the applications submitted by the taxpayers in support of the request for the exemption rulings. Such materials submitted by taxpayers are protected by the secrecy proivisons of the Tax Law (§1146) and of the New York City Administrative Code (§A46-28.0). Matter of Insurance Rating Board v.

Tishelman, 40 AD 2d 765 (1st Dept., 1972). See also, Matter of Manufacturers Trust Co. v. Browne, 269 App. Div. 108, 111-112 (1st Dept., 1945), affd. 296 N.Y. 549 (1946); Thaler v. Murphy, 42 Misc 2d 1 (Sup. Ct., Albany Co., 1964).

Furthermore, the proceedings below show that petitioners' claim of discriminatory enforcement is frivolous. For example, the petitioners' argument made to Mr. Justice Postel in their brief dated March 23, 1977 (at p. 17), that State and City officials had no objection to a change in the law to exempt circuses, is inconsistent with their claim of intentional or fraudulent discrimination. (See also, Pet., p. 9). Certainly, the veto of this legislation by Governors Rockefeller and Wilson on admittedly revenue grounds (Pet., pp. 9-10) does not

constitute a discrimination violative of the Fourteenth Amendment.

(5)

Petitioners' First Amendment argument is equally frivolous.

The First Amendment does not grant immunity from the application of general laws. Associated Press v. National Labor Relations Board, 301 U.S. 103, 132 (1937); Mabee v. White Plains Publishing Co., 327 U.S. 178, 184 (1946); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 194 (1946).

General taxes have been applied to the press from early times without any successful challenge to their constitutionality. In re Jager, 29 S.C. 438, 7 S.E. 605, 609 (1888); Preston v. Finley, 72 Fed. 850 (Cir. Ct., Tex., 1896); City of Norfolk v. Norfolk Landmark Pub. Co., 95 Va. 564, 28 S.E. 959

(1898); Giragi v. Moore, 48 Ariz. 33, 58 P. 2d 1249 (1936); 49 Ariz. 74, 64 P. 2d 819 (1937), app. dism. for want of substantial federal qn. 301 U.S. 670 (1937); Arizona Pub. Co. v. O'Neil, 22 F. Supp. 117 (D. Ct., Ariz., 1938), affd. 304 U.S. 543 (1938); Tampa Times Co. v. City of Tampa, 158 Fla. 589, 29 So. 2d 368 (1947), app. dism. for want of a substantial federal qn. 332 U.S. 749 (1947); City of Corona v. Corona Daily Independent, 115 Cal. App. 2d 382, 252 P. 2d 56 (1953), cert. den. 346 U.S. 833 (1953); Alaska v. Journal Printing Company, 135 F. Supp. 169 (D. Ct., Alaska, 1955).

Even authors have been held subject to business taxes on receipts from licensing their works. Steinbeck v. Gerosa, 4 N.Y. 2d 302 (1958), ap. dism. for want of a substantial fed. qn.

358 U.S. 39 (1958).

It is obvious that the taxes in question are purely revenue-raising measures, applicable to admissions to many forms of entertainment and not aimed at the circus.

The reasons for exempting the legitimate theatre from the taxes was economic, as was the Governors' vetoes of bills to exempt circuses.

Different economic factors affect arena shows, such as circuses. For example, they can accomodate a far larger audience than the usual theatrical production and therefore can better cover their costs, and they have wide public appeal which makes them capable of attracting large audiences. There has been no discrimination against plaintiffs in any constitutional sense.

The petitioners' belated claim of discrimination against interstate commerce is based upon one instance of a small, little-known local circus* failing to collect the sales tax on admissions (A., 45a), thereby subjecting itself to liability for the tax.

Mr. Justice Kirschenbaum in the Court below properly refused to permit the petitioners, on their motion to reargue and renew their prior motion for summary judgment, to replead to allege discriminatory enforcement against interstate commerce as they failed to satisfy the Court that they had good ground to

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*Petitioners' own exhibits in the record below (pp. 290-291) show that this one-ring circus, called the "Big Apple Circus" was opened in July, 1977 for a 13-week run in connection with a school for circus performers and could hardly be considered in competition with the petitioner Ringling Bros. circus.

support this proposed cause of action, one of the requirements of the New York practice statute (CPLR,R3211, subd. e, reproduced at pp. 6-7, supra). Moreover, the request to replead was not made in a motion to dismiss on the ground that the pleading failed to state a cause of action, as required by CPLR,R3211, subd. e, but in a reply affidavit in a motion for reargument and renewal of a decision in an earlier motion for summary judgment.

## Conclusion

The petition for a writ of certiorari should be denied.

June 20, 1980

Respectfully submitted,

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